

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs February 14, 2006

**JAMES CHARLES CAVAYE v. STATE OF TENNESSEE**

**Appeal from the Criminal Court for Davidson County**  
**No. 2000-C-1625     Steve Dozier, Judge**

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**No. M2004-01535-CCA-R3-PC - Filed April 5, 2006**

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This is an appeal from the denial of post-conviction relief. The Petitioner, James Charles Cavaye, was convicted upon a jury verdict of first degree murder and especially aggravated robbery. He received sentences of life imprisonment and twenty-four years to be served consecutively. This Court upheld his convictions and sentences on direct appeal. See State v. James Charles Cavaye, No. M2001-02154-CCA-R3-CD, 2002 WL 31769092 (Tenn. Crim. App., Nashville, Dec. 11, 2002). The Petitioner filed for and was denied post-conviction relief. The Petitioner now appeals the trial court's denial of post-conviction relief, claiming his counsel provided ineffective assistance of counsel. We affirm the judgment of the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed**

DAVID H. WELLES, J., delivered the opinion of the court, in which THOMAS T. WOODALL and JOHN EVERETT WILLIAMS, JJ., joined.

David Martin Hopkins, Nashville, Tennessee, for the appellant, James Charles Cavaye.

Paul G. Summers, Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; Victor S. Johnson, District Attorney General; and Mark A. Fulks and Amy Eisenbeck, District Attorneys General, for the appellee, State of Tennessee.

**OPINION**

**FACTS**

The facts underlying the convictions at issue in this case were summarized by this Court on direct appeal as follows:

Around 4:30 o'clock on the afternoon of January 21, 1998, Dorothy Best, a taxi driver, dropped the victim, David Schulman, off at his business, the Rainbow Room, in Printer's Alley prior to opening for the evening. The victim's usual custom was to sit at the end of the counter reading the newspaper until the bar opened. A

few minutes later, Joe Reno, who was working at the bar next door, stopped by to see the victim, leaving around 5:00 p.m. The victim was a familiar figure in downtown Nashville, and he had been a fixture in Printer's Alley for over fifty years. He was known for his generosity to the homeless who frequented the downtown area, providing those in need with cash or odd jobs from time to time. The victim normally carried change for the bar in the top pocket of bib overalls, his usual attire.

At approximately 6:00 p.m., William Jones, a salesman who serviced the bars in Printer's Alley, made a routine stop at the Rainbow Room. When he walked in, Mr. Jones did not see the victim sitting at his usual spot. He walked down the bar and spotted the victim lying on the floor, with his hands to his throat. Mr. Jones told the victim to "hang on," and ran down the alley to retrieve a police officer. The paramedics were called, and the victim was transported to the hospital where he died early the next morning.

At the time the police processed the crime scene, information on how and why the victim was attacked was scant. In addition, the premises had been disturbed by the paramedics moving some of the bar stools and knocking pictures off the wall as they carried out the victim. Only seventeen fingerprints were retrieved, none of which matched the men ultimately arrested, Jason Pence and Defendant. Blood samples were collected from a towel and the ladies' room, all of which were later determined to belong to the victim. Neither the bottles behind the bar nor the cash register were tested for prints. At the conclusion of the investigation of the premises, no physical evidence was discovered which pointed to a suspect.

Dr. John Gerber, the assistant medical examiner who performed the autopsy, testified that the cause of death was multiple incised wounds to the neck and a blunt force injury to the head. The victim was cut three times on the neck. Although the victim lost a significant amount of blood, the knife wounds were superficial, and, standing alone, would not have resulted in death unless the victim went without medical attention for an extended period of time. In addition to the knife wounds, however, the victim suffered a subgaleal hemorrhage on the left side of his head caused by a blow from a blunt instrument. At the time he was cut, the victim could still have yelled for help since the incisions did not impact the vocal chords. Although Dr. Gerber was unable to ascertain which injuries were inflicted first, the knife wounds were consistent with the perpetrator standing behind the victim. Dr. Gerber could not specify what type of knife was used or what instrument caused the skull fracture.

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At trial, Mr. Pence testified that the following events occurred in connection with the victim's murder. Prior to the murder, Mr. Pence knew the victim because he used to clean the Rainbow Room's bathrooms in 1996. Five or six days before the murder, both he and Defendant decided to rob someone because they were tired of being homeless. Mr. Pence testified that it was his idea to rob the victim because

he knew that the victim carried cash in the pockets of his bib overalls. On the day of the murder, Defendant and Mr. Pence met again around 5:00 p.m. to discuss the robbery in a parking garage across from the Rainbow Room. Defendant told Mr. Pence that he would beat the victim up if he did not give them the money. The two left the garage and went to the Rainbow Room.

Initially, Mr. Pence stood by the doorway as a lookout because he was concerned that the victim would recognize him. However, he left his post because he wanted to see what Defendant was going to do. When Defendant asked the victim for money, he refused. Defendant then hit the victim twice in the face, and three or four times in the stomach, knocking him off his bar stool and on to the floor. As the victim tried to rise, Defendant pulled his head back and placed a knife against his throat. Defendant asked for money again, and when the victim again refused, he cut his throat three times and let him go. Defendant reached over and removed some money from the victim's pockets, then went into the bathroom to wash the blood off his hands.

The victim cried out for help, and Defendant told Mr. Pence "to shut him up." When Mr. Pence refused, Defendant hit the victim over the head with a liquor bottle, then placed the bottle back behind the bar. After that, the victim was quiet. Defendant took some money out of the cash register, and closed the drawer. He and Mr. Pence then left the bar agreeing to meet up later that night to split the money.

Around 8:30 p.m., Defendant and Mr. Pence met at the bar, The Turf. Defendant had blood on his jeans and shirt, and was limping. Defendant gave Mr. Pence \$5 out of the \$45 he had taken from the victim, saying that Mr. Pence had not acted as a lookout like he was supposed to do. Around midnight, the two men separated.

The next morning, Mr. Pence spotted Defendant near Legend's Corner as Mr. Pence headed to the Union Mission for breakfast. Defendant still had on the clothes he wore the night before, and the two of them went into Legend's Corner so Defendant could wash.

Mr. Pence saw Defendant for the last time two days later during a vigil held for the victim in Printer's Alley. He and Defendant, along with a friend and her two sons, attended the ceremony. While they were there, Defendant knelt down, made the sign of the Cross, and sang "Amazing Grace."

Detective Dyer testified that on the evening of the murder she was standing at one end of Printer's Alley when Mr. Jones rushed out calling for help. She responded and found the victim lying on the floor with his throat cut. He was mumbling, and Detective Dyer removed one of his broken dentures; the other lay on the floor next to him. Detective McAlister with the Homicide Division testified that he found blood on the sink, the cabinet and the roll-down towels in the Rainbow Room's ladies restroom. Joe Minor, a forensic scientist with the Tennessee Bureau of Investigation, testified that the blood found in the bathroom belonged to the victim.

Jules Tabor worked at Legend's Corner at the time of the murder. He usually arrived at work around 6:00 in the morning to clean up the bar before it opened. He knew both Defendant and Mr. Pence, and testified that they regularly stopped by in the mornings to use the bar's bathrooms. Mr. Tabor testified that on the day after the murder Defendant and Mr. Pence stopped by as usual. Although Mr. Pence was "presentable," Defendant "was a sight," with his clothes and hair in disarray, and blood still evident on his clothes and person. Defendant was also limping. Mr. Tabor stated that Defendant told him he had been in a fight at The Turf where he worked as a bouncer. Kathleen Moore, the owner of The Turf at the time of the murder, however, testified that the club never employed bouncers.

Barbara Bruce, a friend of Defendant and Mr. Pence, also testified that she saw Defendant on the night of the murder, and he looked like he had been in an altercation, with blood on his clothes, puffiness in his face, and a hurt knee. She stated that it appeared as if Defendant had tried to clean up but had been unsuccessful. When she asked Defendant what happened, Defendant told her he had been in a fight with a homeless person. When she asked Defendant if he had heard about the victim's attack, Defendant said no, but that he wanted to visit the crime scene. She stated that they went to Printer's Alley together that night and stayed about ten minutes. Ms. Bruce testified that she saw Defendant and Mr. Pence the next evening, and they attended the vigil service for the victim.

Don Link was the manager of the Burger King on 4th Avenue. The restaurant's back door opens on to Printer's Alley, and Mr. Link testified that he went down the alley just before dark to the garage across from the Rainbow Room. He stated that it was his usual routine to move his car from the garage's top level to a spot on the first floor near the elevators for security purposes. The night of the murder, Mr. Link noticed two white men standing by the elevators. When his headlights flashed on them, the men went up the stairs. Later, looking at photographs, Mr. Link identified the two men as Defendant and Mr. Pence.

Guy Perry testified that he was Defendant's cellmate for a short period of time. Although Defendant initially denied killing the victim, Defendant later confessed to the murder, telling Mr. Perry that it was just a robbery gone bad. Mr. Perry said that Defendant only admitted hitting the victim and did not mention the knife cuts. Defendant told him that the robbery was all Mr. Pence's idea, and that they had only gotten \$40 or \$45 for their efforts. Mr. Perry testified that Defendant told him he had only given Mr. Pence \$5 because he had not done his job properly. Mr. Perry also testified that Defendant told him that he went to the victim's vigil and sang "Amazing Grace."

On cross-examination, Mr. Perry admitted that he was released from jail early as a result of his agreement to testify in this matter, and that he had read portions of the case file Defendant had in the cell. However, Mr. Perry testified that he had told the police what he knew before the deal for his release was offered, and that he had also helped them on an unrelated homicide investigation.

Michael Hodge also was Defendant's cellmate for a period of time. Mr. Hodge testified that he was in jail on a federal weapons violation, and had not yet been sentenced when he agreed to testify. However, Mr. Hodge admitted he knew that he could get his sentence reduced if he assisted the State. Mr. Hodge testified that Defendant confessed that he and Mr. Pence went to the Rainbow Room to rob the victim, that the victim refused to give them money, and that Defendant hit him prior to robbing him. Defendant then killed the victim "because he wouldn't shut up." Mr. Hodge testified that Defendant thought he would not be convicted because there was no evidence other than Mr. Pence's testimony, and Mr. Pence was a liar with numerous conflicting statements.

Cavaye, 2002 WL 31769092, at \*1-5.

In July of 2000, a Davidson County grand jury indicted the Petitioner on charges of first degree murder, see Tenn. Code Ann. § 39-13-202, and especially aggravated robbery, see id. § 39-13-403. Following a jury trial, conducted in May of 2001, the Petitioner was found guilty as charged and sentenced to life imprisonment for his murder conviction and twenty-four years for his especially aggravated robbery conviction with the two sentences to be served consecutively. In December of 2003, the Petitioner filed a pro se petition for post-conviction relief. The Petitioner was appointed counsel and an amended petition for post-conviction relief, alleging ineffective assistance of counsel, was filed in March of 2004.

In April of 2004, the Petitioner received an evidentiary hearing on his petition for post-conviction relief at which he testified that his appointed counsel ("Counsel") met with him only four times before trial. The Petitioner also stated that while Counsel gave him a copy of the discovery documents for his case, Counsel did not explain the case against him. The Petitioner further testified that Counsel was advised of possible alibi witnesses that were never called, but admitted that Counsel hired a private investigator to track down these witnesses. It was eventually learned that one of the potential witnesses was in a local mental health facility and two others were deceased by the time of trial. Furthermore, the Petitioner noted that Counsel did not call any defense witnesses but admitted that Counsel did cross-examine several State witnesses in a manner that discredited the testimony of other State witnesses.

The Petitioner testified that he was displeased with Counsel's jury selection, which allowed an employee of the Sheriff's Office and an alleged employee of the District Attorney's Office to remain on the panel of juror's who tried his case. The Petitioner also alleged Trial Counsel provided deficient representation for failing to adequately cross-examine his co-defendant and point out the many inconsistencies in the co-defendant's incriminating testimony. However, the Petitioner conceded that Counsel did adequately get the co-defendant to "admit he was a liar; that he was a habitual liar." Nevertheless, the Petitioner maintained that Counsel failed to properly illuminate all the inconsistencies in the co-defendant's testimony.

The Petitioner also testified that Counsel provided bad advice by encouraging him to reject an offered plea agreement and instead go to trial, and for advising him to refrain from testifying on his own behalf at trial. However, the Petitioner conceded that Counsel did warn him that, while he had a good case to take to the jury, circumstantial evidence alone could lead to a conviction, and that he was fully advised of the harsh sentence he faced if convicted. As to Counsel's advice to not take the stand, the Petitioner admitted that he was "hyper" and that Counsel advised him he might not make a good witness.

The Petitioner noted that Counsel, who was also appointed to file his appeal, did not consult with him at all during the appeal process; failed to argue as an issue on appeal that the trial court erred in denying the Petitioner's motion for a change of venue; and failed to pursue an appeal of this Court's ruling to the supreme court. Near the end of his direct testimony, the Petitioner stated, "if I would've known then what I know now . . . [h]ad I known, I would've took the deal . . . ." On cross-examination, the Petitioner admitted that Counsel had managed to get suppressed the statement he gave to the police who arrested him. He also admitted that he was informed that if he had testified, he would have opened the door for the State to introduce portions of this statement at trial.

Counsel testified at the post-conviction hearing that he had been practicing law for approximately nine years, and had previously worked as both a police officer and for the District Attorney's Office. He also testified that, to his knowledge, no one in the jury pool was an employee of the District Attorney's Office, and that the Petitioner informed him that the Sheriff's Office employee in the jury pool was "a stand up guy" who would "do the right thing" and therefore requested that he be left on the jury. Counsel also stated that he met with the Petitioner closer to ten times or more, and the Petitioner had access to his cell phone as well as his paralegal. As to advising the Petitioner not to take a plea offer, Counsel testified that throughout the entire process the Petitioner was "adamant" that he would not accept a settlement, and the only plea agreement was one for twenty years offered the day of the trial. He said that the Petitioner, in no uncertain terms, rejected this offer. Counsel also noted that he did not argue the change of venue issue on direct appeal because he believed it to have no merit, concluding there was "no reason to file a frivolous issue."

On cross-examination, Counsel admitted that he did not communicate with the Petitioner during the appeal process, did not give the Petitioner a copy of the appellate brief he filed with the Court of Criminal Appeals, and did not file an appeal with the Tennessee Supreme Court. Trial Counsel also explained that he advised the Petitioner not to testify because he believed the Petitioner would make a poor witness and his testimony would open the door to bring in the statements the Petitioner made to the police upon his arrest--statements Counsel characterized as "harmful." Counsel also stated that he did locate one of the alibi witnesses identified by the Petitioner a few days before the trial, but this person was in a mental institution and could not offer a direct alibi. Finally, Counsel again testified that he fully advised the Petitioner about the case against him, the risks of trial, and the potential sentence if he was convicted, stating: "We had an in-depth discussion, all the way through, what the ramifications were at trial and especially when we were talking about plea bargain. So he knew what the ramifications were."

The post-conviction court issued an order on May 14, 2004, denying the Petitioner's request for post-conviction relief. The Petitioner timely filed a notice of appeal with this Court. However, this Court stayed the post-conviction appeal because the Petitioner was granted a delayed application to appeal to the supreme court. On May 23, 2005, the supreme court denied the Petitioner's application for permission to appeal. This Court subsequently ordered that the Petitioner's appeal of his denial of post-conviction relief proceed.

### ANALYSIS

On appeal, the Petitioner asserts that the post-conviction court erred in denying his petition for post-conviction relief based on a claim that his trial counsel provided ineffective assistance of counsel. To support this claim, the Petitioner argues that his appointed counsel provided deficient representation because he: (1) failed to investigate the facts of the case and discover and present witnesses, (2) erroneously advised the Petitioner not to testify at trial, (3) failed to advise the Petitioner of his chances of success at trial and erroneously advised him to go to trial and reject a plea agreement, (4) failed to adequately cross-examine the Petitioner's co-defendant, (5) failed to select a fair and impartial jury, and (6) failed to raise all issues on direct appeal and failed to file an appeal with the supreme court. The Petitioner also claims these deficiencies led to actual prejudice in his case.

To sustain a petition for post-conviction relief, a petitioner must prove his or her factual allegations by clear and convincing evidence at an evidentiary hearing. See Tenn. Code Ann. § 40-30-110(f); Momon v. State, 18 S.W.3d 152, 156 (Tenn. 1999). Upon review, this Court will not re-weigh or re-evaluate the evidence below; all questions concerning the credibility of witnesses, the weight and value to be given their testimony, and the factual issues raised by the evidence are to be resolved by the trial judge, not the appellate courts. See Momon, 18 S.W.3d at 156; Henley v. State, 960 S.W.2d 572, 578-79 (Tenn. 1997). The trial judge's findings of fact on a petition for post-conviction relief are afforded the weight of a jury verdict and are conclusive on appeal unless the evidence preponderates against those findings. See Momon, 18 S.W.3d at 156; Henley, 960 S.W.2d at 578.

Both the Sixth Amendment to the United States Constitution and Article I, Section 9 of the Tennessee Constitution guarantee a criminal defendant the right to representation by counsel. See State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999); Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). Both the United States Supreme Court and the Tennessee Supreme Court have recognized that the right to such representation includes the right to "reasonably effective" assistance, that is, within the range of competence demanded of attorneys in criminal cases. See Strickland v. Washington, 466 U.S. 668, 687 (1984); Burns, 6 S.W.3d at 461; Baxter, 523 S.W.2d at 936.

A lawyer's assistance to his or her client is ineffective if the lawyer's conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686. This overall standard is comprised of two components: deficient performance by the defendant's lawyer, and actual prejudice to the defense caused by the deficient performance. See id. at 687; Burns, 6 S.W.3d at 461. The defendant

bears the burden of establishing both of these components by clear and convincing evidence. See Tenn. Code Ann. § 40-30-110(f); Burns, 6 S.W.3d at 461. The defendant's failure to prove either deficiency or prejudice is a sufficient basis upon which to deny relief on an ineffective assistance of counsel claim. See Burns, 6 S.W.3d at 461; Goad v. State, 938 S.W.2d 363, 370 (Tenn. 1996).

In evaluating a lawyer's performance, the reviewing court uses an objective standard of "reasonableness." See Strickland, 466 U.S. at 688; Burns, 6 S.W.3d at 462. The reviewing court must be highly deferential to counsel's choices "and should indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Burns, 6 S.W.3d at 462; see also Strickland, 466 U.S. at 689. The court should not use the benefit of hindsight to second-guess trial strategy or to criticize counsel's tactics, see Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982), and counsel's alleged errors should be judged in light of all the facts and circumstances as of the time they were made, see Strickland, 466 U.S. at 690; Hicks v. State, 983 S.W.2d 240, 246 (Tenn. Crim. App. 1998).

A trial court's determination of an ineffective assistance of counsel claim presents a mixed question of law and fact on appeal. See Fields v. State, 40 S.W.3d 450, 458 (Tenn. 2001). This Court reviews the trial court's findings of fact with regard to the effectiveness of counsel under a de novo standard, accompanied with a presumption that those findings are correct unless the preponderance of the evidence is otherwise. See id. "However, a trial court's conclusions of law--such as whether counsel's performance was deficient or whether that deficiency was prejudicial--are reviewed under a purely de novo standard, with no presumption of correctness given to the trial court's conclusions." Id.

After considering the testimony presented at the post-conviction hearing, the trial court issued an order containing both findings of fact and legal analysis in which it concluded that the Petitioner was afforded effective assistance of counsel. Addressing the Petitioner's claim that Counsel failed to investigate the facts of the case and discover and present alibi witnesses, the post-conviction court noted that Counsel met with the Petitioner "on more than ten occasions" and that he had "unfettered access" to Counsel's cell phone number and his paralegal. The Petitioner himself testified that each meeting was "long," several "in excess of two hours." Furthermore, Counsel hired a private investigator to aid in compiling the facts of the case. As to the alibi witnesses, the post-conviction court stated it "must dismiss this ground without further consideration pursuant to Black v. State, [749] S.W.2d 752 (Tenn. Crim. App. 1990)."

As to the argument that Counsel was ineffective for advising the Petitioner not to testify at trial, the post-conviction court noted that it had "conducted a hearing on the record, pursuant to Momon v. State, 18 S.W.3d 152 (Tenn. 1999), of the [Petitioner's] waiver of his right to testify. After being questioned by the Court and by his counsel, the [P]etitioner stated, 'I've chose (sic) to decide not to testify on my own behalf.'" The court further noted that it had previously determined that the Petitioner understood the right he was forfeiting and the decision not to testify was a "decision that he freely made with the advice of counsel."



The post-conviction court also found that the Petitioner failed to provide clear and convincing evidence that his trial counsel did not consult with him prior to trial concerning the strength of the case against him, had coerced him into going to trial, or had talked him out of accepting a plea agreement. Rather, the court accredited the testimony of Counsel, who stated that the Petitioner was “adamant” about not accepting a plea agreement and was fully apprised of the ramifications of going to trial.

The post-conviction court also found no merit in the Petitioner’s argument that Counsel was ineffective in his cross-examination of the Petitioner’s co-defendant. To the contrary, the court noted the Petitioner admitted at the post-conviction hearing that Counsel “did a good job in cross-examination of the co-Defendant and according to the [P]etitioner even got the co-defendant to admit that he had lied about some of the facts surrounding the case.” Additionally, the court found that Counsel did not err in failing to strike two jurors, noting that there was no evidence presented that one of the jurors in question was an employee of the District Attorney’s Office. Moreover, the testimony of Counsel, which the court accredited, was that the Petitioner requested Counsel to leave the employee of the Sheriff’s Office on his panel because the Petitioner “liked him and [believed he] could be fair and impartial.”

Finally, the post-conviction court found that Counsel was not ineffective for failing to appeal the issue of denial of his motion for a change of venue because there was no merit to this issue. As to the charge of failure to appeal to the supreme court, the post-conviction court granted a delayed appeal, thereby negating any prejudice from this deficiency. Noting that final entry of its order was stayed pending action from the supreme court, the post-conviction court nonetheless concluded that “as to all issues raised other than the delayed appeal” the petition for post-conviction relief was denied.

After considering all the evidence presented to us on appeal, we find that the Petitioner has failed to carry his burden of demonstrating that the evidence preponderates against the post-conviction court’s findings. The evidence reveals the Petitioner’s counsel adequately investigated the facts of the case, even going so far as to retain a professional investigator. Applying an objective standard of reasonableness, we find no deficient representation with regard to Counsel’s investigation of the Petitioner’s case. We also concur with the post-conviction court that the Petitioner’s allegation of deficient representation against Counsel for failure to interview and present alibi witnesses is without merit because the Petitioner failed to meet the clear requirements of Black v. State, 794 S.W.2d 752 (Tenn. Crim. App. 1990) (holding that when a petitioner contends that his or her trial counsel failed to present favorable witnesses in support of their defense, such witnesses must be presented by the petitioner at an evidentiary hearing; otherwise the petitioner is not entitled to relief on this issue). Because the Petitioner did not produce the allegedly overlooked witness(es) at his post-conviction evidentiary hearing, he has failed to raise a valid argument that his counsel provided ineffective assistance of counsel for failing to discover and present a witness. See also Denton v. State, 945 S.W.2d 793, 802-03 (Tenn. Crim. App. 1996).

The Petitioner asserts that Counsel's failure to call him to testify on his own behalf amounted to deficient representation. However, the Petitioner admitted that he was "hyper" and that he was advised his testimony would open the door for the State to enter into evidence damaging statements he made to the police upon his arrest. Counsel credibly testified that he believed the Petitioner would make a poor witness and his testimony would have done more harm than good by bringing in damaging evidence which otherwise would remain suppressed. Under these circumstances, we conclude that Counsel's advice to the Petitioner to not testify was a sound trial tactic. Furthermore, the evidence demonstrates that the Petitioner knowingly and voluntarily waived his right to testify at trial. Accordingly, we conclude that Counsel's decision not to call the Petitioner did not constitute deficient representation.

The Petitioner has also failed to prove by clear and convincing evidence that his counsel provided deficient representation by either failing to adequately explain the strength of the State's case against him, coercing him into going to trial, or persuading him not to accept a plea agreement. Contrary to the Petitioner's testimony, Counsel testified that he thoroughly discussed the strength of the Petitioner's case with him, and that the Petitioner was "adamant" from the very beginning that he wanted to go to trial and would not accept a plea agreement. Moreover, the only plea agreement offered was one for twenty years presented the day of the trial, which the Petitioner outright rejected. The post-conviction court accredited the testimony of Counsel on this issue. As stated above, this Court will not re-weigh or re-evaluate the evidence below and all questions concerning the credibility of witnesses, the weight and value to be given their testimony, and the factual issues raised by the evidence are to be resolved by the trial judge, not the appellate courts. See Momon, 18 S.W.3d at 156. Moreover, we note that the Petitioner admitted at the post-conviction hearing that Counsel warned him he faced the possibility of conviction even though much of the proof was circumstantial.

The Petitioner also claims in his appellate brief that his counsel provided deficient representation by failing to adequately cross-examine his co-defendant and clearly point out the inconsistencies in his testimony. However, at the post-conviction hearing, the Petitioner readily admitted Counsel did a good job of cross-examining his co-defendant to the point of getting him to admit he was a habitual liar who frequently lied if it was to his advantage. Using an objective standard, we are unwilling to find that Trial Counsel's success in discrediting the primary witness against the Petitioner as a "habitual liar" amounts to deficient cross-examination of a witness. Moreover, the Petitioner is not afforded the benefit of hindsight to second-guess his counsel's trial tactics. See Hellard, 629 S.W.2d at 9. Accordingly, we find no deficiency in the representation provided by Counsel with regard to the tactics he employed in the cross-examination of the Petitioner's co-defendant.

The Petitioner also alleges that Counsel provided deficient representation in failing to select a fair and impartial jury. Specifically, the Petitioner claims that Counsel should have excluded two jurors who ultimately were included in the panel that convicted him: one an employee of the Sheriff's Office, and one an alleged employee of the District Attorney's Office. However, the evidence clearly reveals that the Petitioner specifically requested that the Sheriff's office employee,

whom the Petitioner knew and considered a good juror, not be struck. Furthermore, the Petitioner failed to present clear and convincing evidence at the post-conviction hearing that the other juror in dispute was indeed an employee of the District Attorney's Office. Accordingly, we find Counsel was not deficient in his representation of the Petitioner during the voir dire process.

In his last argument, the Petitioner asserts that his counsel also provided ineffective assistance during his appeal. Specifically, the petitioner claims that Counsel failed to raise the issue of the trial court's denial of his motion to change venue on direct appeal and failed to file for permission to appeal to the supreme court. A criminal defendant is entitled to effective assistance of counsel on his first appeal. See Campbell v. State, 904 S.W.2d 594, 596 (Tenn. 1995). The test by which we consider the effectiveness of appellate counsel is the same two part Strickland test used to analyze trial counsel. See Mohamed F. Ali v. State, No. E2001-00183-CCA-R3-PC, 2003 WL 1877242, at \*23 (Tenn. Crim. App., Knoxville, Apr. 11, 2003).

In this case, the Petitioner has failed to demonstrate that his counsel provided deficient representation by not raising the venue issue on appeal. Tennessee case law provides that it is counsel's responsibility to determine the issues to present on appeal. See State v. Matson, 729 S.W.2d 281, 282 (Tenn Crim. App. 1986). This determination falls within the professional judgment and sound discretion of the appellate counsel. See Porterfield v. State, 897 S.W.2d 672, 678 (Tenn. 1995). Furthermore, there is no constitutional right that every conceivable issue be raised on appeal. See Campbell, 904 S.W.2d at 596-97. The determination of which issue to raise is a tactical or strategic choice that falls under the discretion of appellate counsel. Id. at 597. In this case, Counsel, who was also the Petitioner's attorney of record on appeal, made the tactical choice not to raise the change of venue issue on appeal because he determined it to be without merit. Furthermore, the post-conviction court also determined that the venue issue was frivolous. The Petitioner has failed to provide any evidence that refutes the post-conviction court's finding on this issue. Accordingly, we conclude that the Petitioner's counsel did not provide deficient representation based on the issues he chose to present to this Court on direct appeal.

The Petitioner also claims his counsel provided ineffective assistance by failing to file for permission to appeal to the supreme court. The post-conviction court noted that "[t]he proof is uncontroverted that [Counsel] unilaterally decided not to pursue an appeal to the Tennessee Supreme Court." Accordingly, the post-conviction court, pursuant to Tenn. R. S. Ct. 28, § 9(D)(1)(b)(i), entered an order granting the Petitioner a delayed appeal and stayed the post-conviction proceedings pending a final disposition of the delayed appeal. The Petitioner did file a Rule 11 application, which was ultimately denied by the supreme court. See Tenn. R. App. P. 11. Thus, the Petitioner was not prejudiced by his counsel's failure to timely file an application to appeal to the supreme court. Accordingly, the Petitioner was not subjected to ineffective assistance of counsel.

After examining the entire record on appeal, we find that the Petitioner has failed to show that his counsel provided deficient representation in any respect with the one exception of failing to timely file an application to appeal to the supreme court. Having found that the Petitioner failed to meet the first prong of the Strickland test in all but his last argument, we are not required to examine

these issues further. Nonetheless, we note that the Petitioner has also failed to demonstrate that he was prejudiced by any of the alleged deficiencies he argued on appeal.

In sum, the Petitioner failed to prove by clear and convincing evidence that his counsel's representation fell outside the wide range of reasonable professional assistance. Based on our review of the appellate record, the Petitioner is not entitled to post-conviction relief on the ground of ineffective assistance of counsel.

### CONCLUSION

Finding no error, the judgment of the post-conviction court denying the Petitioner relief is affirmed.

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DAVID H. WELLES, JUDGE